No. 3974

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. EIKLAND and O. EIKLAND,
Plaintiffs in Error,

vs.

W. W. CASEY, HENRY SHATTUCK and ALLEN SHATTUCK,
Defendants in Error.

Upon Writ of Error to the District Court for Alaska, Division Number One.

BRIEF FOR DEFENDANTS IN ERROR.

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Plaintiffs' Errors in Statement of the Case.

Instead of making a statement of *this* case, plaintiffs content themselves by quoting this court's statement of the facts on which it based its decision on the former writ of error herein, and by alleging that the issues and evidence herein are the same which then and there obtained. Their purpose in so doing is, of course, to lay a predicate for their contention that the decision on the former writ of error is conclusive in this writ of error.

It is not a fact that the issues are now the same as those on the former trial. On the contrary, the amended complaint is essentially different from the original complaint.

It is not a fact that an affirmative defense is pleaded—on the contrary, the answer is a denial only.

It is not a fact that the evidence at this trial is no stronger than the evidence at that trial—on the contrary, it is much stronger.

It is not a fact that the lower court gave any instruction which this court had held to be erroneous (Plaintiffs' Brief, p. 3, bottom), or that the lower court "paid no attention to the decision of this court" (Plaintiffs' Brief, p. 21), or that the instructions at this trial were the same as the instructions at that trial.

It is not a fact that defendants built a dam or bulkhead across the creek, or that they changed the course of the stream or deflected it, or that the cribbed channel was of less capacity than the original channel. The record shows that each and all of said points were in dispute and that the evidence thereon was conflicting.

It is not a fact that it is admitted in the pleadings that plaintiffs' lot was situated "far above any danger of floods from said stream during periods of high water" (Plaintiffs' Brief, p. 18, end of

1st paragraph). On the contrary, what was admitted was this:

> "Admit that said lot was far above any danger of floods from said stream during periods of *ordinary* high water in said stream" (Tr. p. 8, bottom). (Italics ours.)

It is not a fact that the *evidence establishes without dispute* that "This bulkheaded or artificial channel cut off the waters of the creek from its main natural channel", or changed the course of the stream (Plaintiffs' Brief, p. 18, last paragraph). On the contrary, the evidence on that point was contradictory.

Defendants wish to accentuate the fact that the evidence shows that they were the owners of the land through which the creek flowed, and that plaintiffs were not riparian owners.

Plan of This Brief.

There are nine Assignments of Error; the first two relate to instructions requested and refused, and the remainder relate to instructions given.

Plaintiffs' argument and brief concede that the validity of Assignments Nos. III, IV, V, VI, VII, VIII and IX is directly and entirely dependent upon the determination of the validity of Assignments I and II (Plaintiffs' Brief, p. 11, bottom; p. 20, bottom).

This brief will, therefore, be devoted to a discussion of Assignments Nos. I and II only; and as Assignment No. I could not be sustained unless Assignment No. II is valid, the latter assignment (being the storm center of the case) will be first adverted to.

ASSIGNMENT No. II (Tr. p. 397).

> "That the court erred in refusing the prayer of the plaintiff to instruct the jury as follows: 'There is no sufficient evidence before you to justify a finding that the damages to the plaintiffs' property was caused by an act of God, as that term is used in the law'."

We think that the very indefiniteness of this request precludes the non-giving of the requested instruction from being error, for the term "Act of God" is used in the law in a great variety of senses, and it is not apparent to which sense plaintiffs refer. If, however, the meaning of the requested instruction is as if it were expressed thus: "There is not sufficient evidence before you to justify a finding that the flood in question here was an extraordinary flood, a flood not reasonably to be expected by the ordinarily prudent man", none the less was it not error to have refused it.

In considering this assignment, we purpose (1) To treat this writ of error as of "first impression"; (2) To combat the contention that the decision on the former writ of error is conclusive to the effect

that it was error to refuse to give the requested instruction set out above.

In treating the case as of "first impression", we will discuss the pleadings *as they now are,* and the evidence *here* presented and the law applicable. We maintain that the law is that the owner of land through which a stream flows has the right to interfere with the flow or to lessen the channel capacity, *provided that in so doing he is not guilty of negligence;* that failure to anticipate and guard against an ordinary flood is negligence; that failure to anticipate and guard against an extraordinary flood is *non*-negligence; that, the action being founded on negligence, the burden is on plaintiffs to prove negligence, not on defendants to prove non-negligence; that whether defendants do or do not introduce any evidence of *non*-negligence, plaintiffs cannot recover unless on the whole case "negligence" is made out; that the term "Act of God" as used in this case means only an extraordinary flood—a "not to be expected" event—an "unanticipatable" event, and that the evidence on the part of defendants as to the nature of the flood as being "ordinary" or "extraordinary", is evidence tending only to negative the charge of want of ordinary care; and that, therefore (because the question as to whether or not there is evidence tending to negative a charge and proof of negligence is a pure question of fact for a jury) it was not error to refuse to give the requested instruction.

In combating the claim that the opinion on the former writ of error is conclusive of this writ of error, we will show how the issues in the two cases were vitally different from each other, and where and in what respect the evidence now presented is stronger than the evidence then presented.

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(1)

THIS WRIT OF ERROR AS "OF FIRST IMPRESSION".

THE PLEADINGS.

Amended Complaint.

The amended complaint alleges that defendant deflected the stream and made a new channel of less capacity than that of the former channel; that the new channel was too narrow and wholly insufficient to carry the waters at times of floods such as ordinarily occur therein at times of heavy rains; that defendants were grossly negligent in the planning and construction of the flume in that same was of too small capacity, and *in that said flume*

> *"was too flimsy, weak and insufficient to hold together during flood waters* in said creek; that on September 26, 1918, there occurred, *one of the usual periodical heavy rains* to which the vicinity is subject, which caused the water of Gold Creek to rise * * * and to be forced through and down said flume or artificial chan-

> nel and said waters were deflected upon, undermined and washed away plaintiffs' land,—and that said deflecting, undermining and washing away happened because the artificial channel was too small, and *because the said artificial channel* (cribbing) *was so insufficient, flimsy and weak that some of it gave away and lodged in the said artificial channel"* (Par. IV, Amended Complaint, Tr. p. 3).

Thus it will be seen that the amended complaint charges two distinct alleged delicts, to-wit: First, that defendants changed the flow of the water, deflecting it into a cribbed channel, and that the alleged artificial channel was narrower, etc.; Second, that the cribbing was weak, flimsy, negligently constructed and insufficient to withstand an ordinary flood—(that is, so weak and flimsy, and so negligently and insufficiently constructed as to be unable to withstand the strain which could reasonably be expected would probably be put upon it).

Plaintiffs' idea in thus framing the complaint is very evident. Apparently they believed that "one who for his own purpose diverts the waters of a stream from the natural channel or confines them in artificial banks, so as to thereby damage the property of another, is liable for such damages, irrespective of the existence of negligence in his so doing" (Plaintiffs' Brief, p. 21). But obviously they thought that they had better "cast an anchor to windward", and they expressly add an allegation of specific negligence in the physical

construction of the cribbing, with the view that if it should be held that the law is not as they maintain, or if the proof should show that the defendants did *not* change the flow or narrow the channel, they (plaintiffs) might still have a case by proving "express" negligence in the physical construction of the flume or cribbing. No such doubts assailed plaintiffs at the former trial, for that trial was on a complaint which was framed on the first theory alone; that is to say, there was no allegation then that the cribbing was flimsy, weak or insufficient, or that any "logs or material were washed out of the sides of the cribbing, and became lodged in the flume" (cribbed channel). The *complaint* was founded solely upon the theory that defendants were liable, negligence or no negligence, but by the *amended complaint*, adding the second "delict" above mentioned, plaintiffs have injected into the case a new issue, one which was not involved on the former trial, to-wit: Was the cribbing negligently constructed?

The Answer.

Denies all the essential allegations of the complaint (Pars. IV and V of answer, Tr. pp. 9, 10), and that is all it does. No affirmative defense is pleaded.

The answer alleges that said flood and heavy rains were unusual, unprecedented, extraordinary, but this is nothing more than a denial of the allega-

tion of the complaint that the flood was "usual and ordinary and periodical".

The answer alleges that it was such a flood as could not have been foreseen by defendants or anyone else, but this is nothing more than a denial of negligence.

The answer denies that the damage to plaintiffs' property was caused by any act of defendants and (alleges that it) was due to an Act of God, but if the damage was not caused by an act of defendants, it was unnecessary to allege or prove by whose act it was caused, for if the defendant is guilty of want of care, causing the injury, it is *no defense at all* that the Act of God contributed; and if defendant is not guilty, all he is called upon to do is to deny negligence, thus putting plaintiffs to prove the absence of that care required under the circumstances.

Under the code that only is an affirmative defense which confesses and avoids, but here nothing is confessed, nothing is sought to be avoided.

The defense here pleaded is not at all analogous to a defense which, while admitting shortcomings on the part of defendants, pleads that, notwithstanding those shortcomings, an unexpected convulsion of nature occurred, so overwhelming in its effect upon the works of man that it caused and would have caused the disaster even if those works of man had been constructed with the utmost care—

as, for instance, the happening of an earthquake, or a tidal wave. In such a case, the plea of "act of God" would be an affirmative defense, for it would be to confess a want of care which would hold defendants to liability *unless* the said convulsion were proven.

Nor is the defense at all analogous to the carriers' plea of "act of God" as a defense in an action sounding on contract "to safely carry except as prevented by the public enemy or the 'act of God' ". In such case the defense of "act of God" is an affirmative defense, because the carrier admits the contract and its breach, but seeks to bring himself within the exception. But here the defense is simply a denial of negligence, and nothing is alleged that could not be proven under the general denial.

The answer is argumentative, it is true, and unnecessarily disclosed defendants' case to the adversary, "yet the defense altogether is a denial" "*Pomeroy's Remedies and Remedial Rights,* 2d Ed., Sec. 625, p. 680; *Elliott v. St. Louis R. Co.,* 78 Mo. 518; *Gault v. Humes,* 20 Md. 297; 2 *Bates Pldg. & Pr.,* p. 2884, sub. sec. 1, p. 2885, sub. sec. 1).

The Evidence.

At this trial plaintiffs in their case in chief introduced evidence tending to sustain all the allegations of the amended complaint as to each delict charged therein, and defendants introduced evidence tend-

ing to negative each and every essential allegation as to *each and all* of the delicts so charged.

The evidence as to the changing of the channel.—*Shattuck* testified that the channel was not changed; he says that before the cribbing was installed the "original channel" had been filled up by the high water of 1913, and that at the time the cribbing was put in the creek was flowing in the channel which they then "cribbed" (Tr. p. 121). *Casey* also so testified (Tr. p. 212), and *Stewart,* witness for plaintiffs, while stating that the channel marked on his map "Original Channel" was *at one time* the original channel, does not state *"when"* it was the original channel, and says:

> "I will state however that channel does not show any recent signs of being cut out. * * * There are still alders and bushes in there" (Tr. p. 25).

Evidence as to lessening the capacity of channel.—*Stewart* says that he measured the cribbed channel and that the area of a cross-section thereof was 150 feet, and then he says that he took a cross-section of the "Original Channel" above where it branches and that its area was 230 sq. ft. (Tr. p. 19); but a glance at the map produced shows where he measured, to-wit, the line AB in Block 213. That line measures the width of "Original Channel" and of "Old Channel" combined, and no witness has testified that the water flowed in "Original Channel" and "Old Channel" at the same time. Certainly no witness testified that the water ever *filled*

both those channels at the same time. He also took a measurement of the width of "Original Channel" where said channel crosses 9th Street between blocks 218 and 219 (Tr. p. 20), and gives the width as 62 feet, but he does not say what the depth was nor what was the area of a cross section. Only a "weak, lame and impotent conclusion", then, can be drawn by a comparison of the area of the two cross-sections, i. e., 150 sq. feet and 230 sq. feet.

Casey testified that the capacity of the cribbed channel was 40% to 50% greater than the capacity of the flume of the water company which had carried the creek for several years (Tr. p. 211).

The evidence showed that the cribbed channel was narrowed at the lower end, but it was also deepened there (Tr. p. 210), and there is no evidence that its capacity was diminished. The evidence showed that it was good construction to deepen and narrow at lower end (Tr. p. 210; also Tripp, Tr. pp. 274, 275).

Considering this case as resting alone upon the question as to whether or not the flow was changed or the channel capacity lessened, and admitting *for the sake of argument only* that the law is as plaintiffs contend (to-wit: "If the owner of land through which a stream flows deflects the flow or narrows the channel, he is liable for resulting dam-

age whether the work of so deflecting or narrowing is or is not negligently done"), still it would not have been error to refuse the requested instruction; for in that view of the case it would have been absolutely immaterial whether or not the court told the jury anything at all about what was sufficient to constitute an "act of God". In that view of the case plaintiffs would have been entitled to an instruction:

> "*If you believe* from the evidence that defendants deflected the stream or lessened the channel capacity, they are liable for resulting damages—act of God or no act of God—negligence or no negligence."

Defendants maintain that the law is not as above stated, and that this court has never held the law to be as so stated. *But pretermitting those questions "for the nonce", and admitting for the sake of the argument only* that under that aspect of the case it was error to refuse the requested instruction, yet it is to be noted that the amended complaint and the evidence present the case in *another* aspect also, to-wit: they call for a determination of the question as to whether or not defendants were guilty of the specific negligence in the construction of the cribbing, and unless it was error to refuse the requested instruction when the case is considered in *either and both* of said aspects, the assignment of error cannot be sustained.

Considering the case, then, in the last mentioned aspect, it is apparent that the question as to whether or not the cribbing was constructed sufficiently strong to stand the strain which might be reasonably expected would be put upon it is the crucial point.

Evidence as to nature of the flood.—Briefly stated, that evidence was as follows:

(1) *Susie Michaelson* (Tr. p. 189), an Indian woman, fifty years of age, born in Juneau, raised on the banks of the creek and observed it all the time she lived there (Tr. p. 195); never saw as much water in Gold Creek (Tr. p. 195), nor as much rain as there was that day (Tr. p. 192).

On page 14 of their brief plaintiffs seek to belittle this woman's testimony by stating that she testified that "she had never before seen Gold Creek except when the water was running in the main channel", and they say, "If this was true the high water of September 26th was the only one she ever saw"; but this cannot be "by no assay of reason", for the witness immediately says:

> "Yes, I have seen it go over the banks of the creek, *but I never seen it flow as it did that time you are talking about 1918"* (italics ours).

It is also stated by plaintiffs (on same page): "She also said she couldn't remember how many times she had seen high water. It never entered my mind". What the witness said was, "I couldn't —*I never kept track of how many times.* It never

entered my mind'' (italics ours; Tr. p. 195, bottom), obviously meaning that to keep track of the *number* of times never entered her mind.

(2) *B. M. Behrends* (Tr. p. 314), a banker; has lived in Juneau ever since 1887; has never seen as high water in Gold Creek (Tr. p. 315), nor as much destruction and damage (Tr. p. 315), nor as great a rainfall:

> "It was extraordinary; that is why we went out there'' (Tr. p. 318).

(3) *George Dull* (Tr. p. 398); manager of Water Works; has lived in Juneau for over 25 years; never saw as high water in Gold Creek; doesn't believe he *ever* saw as great a rainfall as there was here that day *at any time* within his memory.

Attention is called to the whole of this witness' testimony, as showing the abortiveness of plaintiffs' attempt (on page 15 of their brief) to disparage it.

(4) *John Reck* (Tr. p. 305), president of 1st National Bank, also superintendent of water works; has lived in Juneau for 24 years; never saw the creek as high, nor the rainfall so great (Tr. p. 307). The water company's flume which carried the creek over the water company's springs was overflowing and the timber began to gather at the upper end; later the road and flume went out; water main was gone too, washed out by the flood (Tr. p. 309);

such a thing never happened before (Tr. p. 311); is positive (Tr. p. 313).

The attempt to minimize this witness' testimony by calling attention (plaintiffs' brief) to the fact that during his 24 years of residence he has been absent a few times, a week or two at a time, is unavailing.

(5) *Charles Goldstein* (Tr. p. 179); has lived in Juneau for 37 years; never saw Gold Creek as high as that before (Tr. p. 180); is not positive as to amount of rainfall.

(6) *Allen Shattuck* (Tr. p. 118); has lived in Juneau ever since 1897 (24 years); ever since 1903 has lived in plain view of the creek; never saw as great a rainfall or the creek so high (Tr. pp. 151-2).

(7) *J. C. McBride* (Tr. p. 324); U. S. Collector of Customs; has lived in Juneau ever since 1904; this the largest rain and highest flood ever since he came.

(8) *John C. Hayes* (Tr. p. 353); superintendent of Alaska Road Commission; has lived in Juneau for 10 years off and on; never in his experience has he seen as great a rainfall or as high water in Gold Creek or vicinity as there was on that day.

(9) *George Oswell* (Tr. p. 292); mine superintendent; has lived up Gold Creek from Juneau since January, 1914; at 8:30 a. m. the flow of the creek was larger than the flume (of the water company)

could carry and it was spilling over (Tr. p. 293); never saw Gold Creek so high before or since; *never* experienced as great a rainfall (Tr. p. 296).

(10) *George T. Jackson* (Tr. p. 358); superintendent of Perseverance Mine at head of Gold Creek; has lived in and about Juneau for eleven years; no such water in creek and no such rainfall within his experience (Tr. p. 359).

(11) *Weather records.*—(a) *I. J. Sharick* (Tr. p. 346); kept records of the 24-hour rainfalls from 1894 to 1912; produces records; during the period covered by those years, greatest rainfall was September 7, 1902, 4.01 inches, next greatest was on October 17, 1905 3.5 inches; next greatest on August 26, 1905, 2.17 inches (Tr. p. 347).

(b) *Melvin B. Summers* (Tr. p. 319); in charge of Government Weather Bureau at all times since 1916; before he came weather records were kept by governor's office; all records now in his possession (Tr. pp. 320-1). Records show:

Rainfall on September 26, 1918, 5.54 inches; next greatest in September, 1902, 4 inches; next greatest in October, 1913, 3½ inches.

The official records from Washington, showing rainfall, 1909-1918, is filed as Exhibit .....

(c) *George H. Canfield* (Tr. p. 354); engineer U. S. Geological Survey, in charge of water gaging stations since 1910; gage not established in Gold Creek until July 20, 1916; on September 26, 1918, gage record 6.81 feet or 2600 cubic feet per second;

highest before that was August 19, 1917, 1000 cubic feet per second (Tr. p. 355); the high water of September 26, 1918, put the gage out of business (Tr. p. 354, bottom).

(d) *Emil Gastonguay* (Tr. p. 284); in charge of Power Division of Alaska Gastineau Mining Co. at Perseverance Mine and various other places in vicinity of Juneau; Perseverance Mine at head of Gold Creek, 4 miles from Juneau (Tr. p. 386); has kept records of precipitation at Perseverance since 1914; records show *greatest precipitation at Perseverance, September* 26, 1918; 7.4 *inches;* next greatest May 28, 1918, 3.4 inches; next, 2.71 inches; next 2.65 inches, next 2.6.

(12) There was evidence that defendant Casey came to Juneau in 1898; he was familiar with climatic conditions, rainfall and flood conditions, height of water (Tr. p. 214), and took them all into consideration in building the cribbing (Tr. p. 213); consulted with Tripp and other engineers (Tr. p. 213); the cribbed channel was 40 to 50 per cent greater than a flume up the creek that had safely carried the waters (Tr. p. 211). Tripp considered the cribbing good, suitable construction (Tr. pp. 275-4).

(13) It was in evidence that this flood swept away structures of long standing and did damage the like of which never before was inflicted; a bridge over Gold Creek had withstood every flood from before 1898 to 1914, when it was torn down

(Tr. p. 222), and a new one built 4 or 5 feet higher; this latter bridge went out (Tr. pp. 223, 148). The Ebner flume and two bridges went out (Tr. p. 295). One hundred fifty feet of approach to another bridge that had stood for 15 years or more was "washed clear away and the bridge left high and dry" (Tr. p. 360). The road was washed out entirely, the map of the whole creek was changed (Tr. p. 295). Juneau was in darkness; no lights that night (Tr. p. 206). Oswell came to town for safety (Tr. p. 298).

(14) The flood completely washed away in a few hours upland lying many feet above the channel level, which was covered in part with stumps and had never so far as known been so affected by floods before, and this, too, before the flood waters reached the cribbed channel (Tr. pp. 141-2). Trees, stumps, boulders, bridges, flumes, houses were swept away by the angry waters.

THE LAW.

DEFENDANTS NOT INSURERS.

It is the doctrine of the American authorities (almost unanimous) that the owner of land through which a stream flows who changes the flow or narrows the channel or cribs the banks, *and who exercises reasonable care in so doing,* is not liable for damage inflicted.

Cases so holding from nearly every State in the Union are cited in the margin.[1]

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(1) Farnham on Waters and Water Rights, secs. 477, 990.

Alabama: 145 Ala. 639, 39 So. 603, 117 Am. St. Rep. 61; 176 Ala. 174, 57 So. 833; 183 Ala. 411, 62 So. 802;

Arkansas: 57 Ark. 387, 21 S. W. 1066;

California: 10 Cal. 413; 10 Cal. 541; 17 Cal. 98; 23 Cal. 255; 35 Cal. 683;

Colorado: 14 Col. App. 123, 59 Pac. 422;

Connecticut: 55 Conn. 510, 13 Atl. 409; 81 Conn. 87, 70 Atl. 650;

Georgia: 98 Ga. 184, 26 S. E. 738; 134 Ga. 107, 67 S. E. 652;

Idaho: 9 Idaho 392, 74 Pac. 1075.

Illinois: 143 Ill. 127, 32 N. E. 529; 43 Ill. App. 78; 11 Ill. App. 17;

Indiana: 3 Ind. 236, 54 Am. Dec. 481; 60 Ind. App. 118, 110 N. E. 230;

Indian Territory: 3 Ind. Ter. 352, 58 S. W. 570;

Iowa: 126 Iowa 90, 101 N. W. 736; 148 Ia. 556, 126 N. W. 369; 159 Ia. 666, 141 N. W. 49; 170 Ia. 203, 152 N. W. 779; 115 N. W. 1013; 158 N. W. 676;

Kansas: 26 Kan. 754;

Kentucky: 161 Ky. 793, 171 S. W. 405; 166 Ky. 327, 179 S. W. 195; 167 Ky. 329, 180 S. W. 517; 107 S. W. 781; 32 Ky. L. Rep. 1049; 121 S. W. 972; 147 Ky. 37, 143 S. W. 770;

Maine: 66 Atl. 646, 99 Me. 134, 58 Atl. 674; 56 Me. 443; 12 Me. 238;

Maryland: 75 Md. 458, 24 Atl. 157;

Massachusetts: 2 Allen 358; 13 Gray 193;

Michigan: 45 Mich 578, 8 N. W. 587, 909;

Mississippi: 72 Miss. 677, 17 So. 78, 48 Am. St. Rep. 579, 27 L. R. A. 762;

Missouri: 187 S. W. 260; 17 Mo. App. 177; 161 Mo. App. 472, 144 S. W. 174; 36 Mo. App. 476; 69 Mo. App. 431;

Montana: 45 Mont. 33, 121 Pac. 886;

Nebraska: 14 Neb. 170, 15 N. W. 321; 76 Neb. 420, 107 N. W. 590, affirmed 81 Neb. 430, 116 N. W. 299; 95 Neb. 506, 145 N. W. 1013; 96 Neb. 714, 148 N. W. 900; 81 Neb. 186, 115 N. W. 755;

New York: 70 Hun. 495, 24 N. Y. S. 381; 75 Hun. 479, 27 N. Y. S. 469; 122 N. Y. S. 1095, judgment affirmed 151 App. Div. 198, 104 N. Y. S. 702;

Ohio: 31 Ohio Cir. Ct. Rep. 349;

Oregon: 47 Ore. 350, 83 Pac. 843;

Pennsylvania: 96 Pa. 65, 42 Am. Rep. 529; 218 Pa. St. 309, 67 Atl. 644; 30 Pac. Super. Ct. 305; 203 Pa. St. 516, 53 Atl. 361; 9 Watts 119, 34 Am. Dec. 507; 23 Pa. St. 445; 64 Pa. St. 106, 3 Am. Rep. 578; 66 Pa. St. 91; 157 Pa. St. 622, 27 Atl. 793; 6 Pa. St. 379, 47 Am. Dec. 474;

Texas: 50 Tex. 330; 69 Tex. 617, 7 S. W. 374; 98 Tex. 590, 86 S. W. 744;

Vermont: 81 Vt. 141, 69 Atl. 732, 130 Am. St. Rep. 1031, 16 L. R. A. N. S. 928;

Washington: 85 Wash. 397, 148 Pac. 567;

Wisconsin: 38 Wis. 21; 143 Wis. 169, 126 N. W. 666;

Virginia: 105 Va. 343, 54 S. E. 25, 6 L. R. A. N. S. 252.

Federal Courts: 57 Fed. 441.

This court has not held to the contrary—either on the former writ of error or in any other case. In its decision on the former writ of error this court said:

> "Such an instruction *would have been justified* under the doctrine of the leading case of Ryland v. Fletcher, L. R. 3 H. L. 330, and other English cases cited by the plaintiffs. * * * This inherently just and equitable doctrine of the English Courts has been accepted in *a few* of the courts of the United States; * * * and no reason is suggested why it should not be applied to the present case, except the reason—if it be a reason—that *it is opposed to the decided weight of American authority.* * * * But if that reason is controlling and we are required to *follow the rule generally accepted in the United States that one who in changing the natural channel of a stream exercises reasonable precaution against floods which may be expected is not responsible for damage occasioned thereby, there still remains* * * *" etc. (Italics ours.)

Thus it will be seen that while the learned Justices who concurred in the decision seemed to "look askance" at the "doctrine of the decided weight of American authority", they do not refuse to adopt that doctrine.

That this court means to follow that doctrine affirmatively, appears by a later pronouncement of this court in the case of *Nelson v. Casey* (279 Fed. 100, 102)—a case arising out of the flood in question here, where the opinion was concurred in by the

same Justices who rendered the opinion in *Eikland v. Casey* (supra). There this court says:

> "The duty which devolved upon the defendants was not that of insurer, but was to use reasonable care to construct the bulkheads of sufficient strength to resist waters which ought reasonably to be anticipated as likely to come down the creek, and to use reasonable care to maintain the bulkheads of sufficient strength to resist such waters." (Citing cases.)

ACT OF GOD—EXTRAORDINARY FLOOD—BURDEN OF PROOF.

The essential question in this case, under the last mentioned aspect (i. e., the charge of negligence in construction of the cribbing), is not, strictly speaking, whether the cribbing broke under a strain put by an "act of God"; but rather it is this: Were defendants negligent? Was the strain which was put upon the cribbing such as defendants ought reasonably to have expected would be probably put upon it by someone, be that some one *God* or *man?* And did such strain break the cribbing? And ought defendants to have reasonably expected that such strain would break the cribbing?

As an eminent author expresses it, "The test in every such case being whether the defendant ought reasonably to have anticipated that evil consequences would flow from his act" (1 *Thompson on Negligence,* Sec. 74); and

> "Thus a railroad company constructs a culvert of sufficient dimensions to carry off all water that accumulates in times of ordinary

> freshets but which proves insufficient in a time of flood *so great as to be ascribed* to the act of God—a flood so great that the company could not be expected to foresee and provide against it. Here the company ought not to be liable to pay damages; and one may take his choice between these two reasons: (1) The catastrophe is to be ascribed to the 'act of God' * * * (2) *The railroad company has not been negligent*" (italics ours).

Whether the cribbing gave way under a strain reasonably to be expected would be put upon it was a pure question of fact for the jury. The court could no more properly tell the jury that they *must* consider the strain an ordinary one, than it could properly tell them that they *must* consider the strain an extraordinary one. The author last above quoted says:

> "Consequently it does not follow—especially where the independence of juries is vigorously upheld—that the judge can properly order a nonsuit in an action for an injury founded upon the overflow of sewers, or the failure of a culvert to carry off water during a severe fall of rain, because he may take the view that the storm was, under the evidence, 'extraordinary'" (Thompson on Negligence, sec. 4877, citing Capital Ptg. Co. v. Raleigh, 126 N. C. 516, 36 S. E. 33; McClure v. Red Wing, 28 Minn. 186; 9 N. W. 767).

All the court *could* do in this regard, was to tell the jury what is meant by anticipatable strain and what is meant by unanticipatable strain, leaving it to them to find whether, under the evidence, the

strain was the one or the other. This is all the court did, and there is no complaint that in so doing the court misstated the law on that point. The complaint is only that the court refused to instruct that there was *no evidence* of *act of God*. In using the expression "act of God", it is to be noted that as applied to this case, the terms "act of God" and "extraordinary flood" are interchangeable, and neither of them means anything more than "unanticipatable" event. If the flood was unanticipatable, it was "extraordinary", and if it was extraordinary, it was an "act of God"; and it was not an act of God if it was anticipatable, and if it was an anticipatable flood, it was an ordinary flood.

It is evident from the instructions taken as a whole that the *court* used the terms "act of God" and "Extraordinary flood" as meaning one and the same thing. When, then, plaintiffs contend that the court should have instructed the jury that "There is no sufficient evidence before you to justify a finding that the damages to the plaintiffs' property was caused by an 'act of God', as that term is used in the law", they in effect ask the court to instruct the jury that there is no evidence that the strain put upon the cribbing was greater than that which it could be reasonably expected to bear—a pure question of fact which the jury might have found against the plaintiffs even if defendants had introduced no evidence at all on the subject;—they in effect maintain that all the evidence

for defendants herein does not even tend to negative the charge and evidence of negligence.

NEGLIGENCE TO BE PROVEN.—RES IPSA LOQUITUR.

If there is any exception to the rule that he who alleges negligence must prove it, we have never read of it. Certain it is that the rule is not changed by *res ipsa loquitur*.

> "In all actions for damages for the injury of property from breakage and overflow (except in reservoir and dam cases in jurisdictions where by statute, or by court decisions the owner is made the insurer against all damages), the gist of such actions is negligence; and therefore until such negligence is shown by the evidence, there can be no liability upon the part of the defendant causing the injuries: * * * and therefore, the burden of proof rests in the first instance upon the plaintiff to prove the negligence in conformity with the allegations in his complaint charging the same. * * * Mr. Farnham states a different rule, as follows: 'If a break occurs the burden is upon the owner of the ditch to establish his freedom from negligence, and his failure to do this will render him liable.' That this is not the rule of law in these cases is borne out by the great weight of authority. As was held in an early California case the rule of *res ipsa loquitur* does not apply in such cases (citing Tenney v. Miner, 7 Cal. 335). In a late Washington case, however, the exact contrary rule was adopted and the court said, 'We think the better rule is that the doctrine of *res ipsa loquitur* applies in cases of this character'; Dalton v. Selah, 122 Pac. 4. * * *

> The rule as stated by Mr. Farnham is not the correct one as laid down by the authorities, neither is it the logical one." 3 Kinney, sec. 1693, pp. 3124, 3125 (italics ours), citing cases.

We think there is no conflict between the rule as announced by Mr. Kinney, and those cases which hold that the doctrine of *res ipsa loquitur* applies; for *res ipsa loquitur is itself a mere rule of evidence,* and does not at all shift the burden of proof.

Kahn v. Triest Rosenberg Co., 139 Cal. 341, 346;

Cody v. Market St. Ry. Co., 148 Cal. 90;

Rourgournon v. P. R. R. Co., 57 Cal. Dec. 602.

Or, as the Supreme Court of the United States expresses it:

> "In our opinion *res ipsa loquitur* means that the facts of the happening * * * *make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur* where it applies does not convert the defendants' general issue into an affirmative defense. *When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."* Sweeney v. Erving, 228 U. S. 232; 50 L. Ed. 240.

Plaintiffs' evidence *tended* to show that defendants changed the flow of the water and narrowed the channel, and that damage resulted therefrom. This, if believed by the jury, would (under the cases holding that *res ipsa loquitur* applies), give rise to a prima facie presumption of negligence

which is of itself evidence of negligence. If, then, plaintiffs had produced no further evidence, they would have made (under such cases) a *prima facie case, but it would have been a prima facie case with respect only to the delict first charged in the amended complaint*—and even as to that delict it would have been a *prima facie case on account only of the presumption* which came to plaintiffs' aid as evidence; and, as *defendants' evidence* tended to show that defendants *did not* change the flow of the stream or lessen the capacity of the channel, the question in this regard for the jury to determine was whether or not *any facts were established* which would give rise to the said presumption. If the jury should decide that defendants did *not* change the flow of the stream or lessen the channel's capacity, the presumption would vanish and plaintiffs would certainly lose the case, *unless they had proven that defendants were otherwise guilty of want of ordinary care.* But if plaintiffs produced evidence as to the first delicts charged and produced *no* evidence of any additional negligence on the part of defendants, the utmost plaintiffs could have asked the court to instruct would have been in substance this:

> "*If you believe* that defendants deflected the flow or lessened the channel's capacity, they are liable whether the flood was or was not an act of God."

But plaintiffs did not request an instruction as above indicated, and they *did* produce evidence tending *to show other and additional* negligence.

In the effort to prove that defendants were *otherwise guilty of negligence,* plaintiffs have no presumption to aid them. In this regard it will not be sufficient to prove simply what defendants did. Plaintiffs must go a step further and prove that what the defendants did was not sufficient to meet the dangers which the latter had reason to except would arise. Plaintiffs seem to "sense" this at the trial, for they produce *in their case in chief* two witnesses who gave evidence tending to show that the flood in question was "ordinary" (Wagner, Tr. p. 105, and Coggins, Tr. pp. 96-7); that is, that it was a flood reasonably to be expected; that it was not an unanticipatable flood;—this, of course, in the effort to establish that defendants *did not exercise ordinary care* when they built the cribbing so "weak, flimsy and insufficient", for plaintiffs could not be said to have introduced evidence tending to show negligence *in this regard* unless they had introduced evidence tending to show that the danger was one which was likely to arise—one which defendants knew or ought to have known was likely to arise—one which an ordinarily prudent person would have guarded against. There being no affirmative defense pleaded, defendants'

evidence *in this regard* went no further, and did not need to go any further, than simply to *tend* to meet the case of negligence made by plaintiffs—than simply to *tend* to show that the flood was not one which the ordinarily prudent person would guard against, i. e., could reasonably expect would likely occur.

The issue and evidence as to the character of the flood is here—plaintiffs maintaining that it was such a flood as should have been guarded against, defendants maintaining that it was not such a flood as was required to be guarded against. There is no presumption that it was the one or the other, but defendants start out with the presumption that they were not negligent and the burden is on plaintiffs to prove negligence.

As there was evidence that the flow was not deflected, or the capacity of the channel lessened, a jury might well find in the negative on those points, and yet they would have to find for plaintiffs if they believe from the evidence that the cribbing was negligently constructed, and that such negligence caused the disaster. In determining that question of negligence, they would necessarily have to consider not only the manner of the construction of the cribbing, but also the nature and force of the strain which it would be reasonable to expect might be put upon it; and the further question, of course,

whether or not the cribbing gave way under a "reasonably to be expected" strain. The jury could not find negligence unless plaintiff proved negligence; the plaintiffs could not prove negligence in this regard without proving that the strain was one reasonably to be expected; and plaintiffs could not prove that the flood was one reasonably to be expected without proving that the flood was ordinary.

The burden then was on plaintiffs to prove that it was an *ordinary* flood; not on defendants to prove that it was an "extraordinary" flood, for an ordinary flood is one reasonably to be expected, i. e., anticipatable; and an extraordinary flood is one not reasonably to be expected, i. e., unanticipatable. If, then, plaintiffs proved that it was an ordinary flood they necessarily proved that it was *not* an extraordinary flood; but if they did not prove that it was an ordinary flood they have not proved that the cribbing broke under a strain "reasonably to be expected", and consequently have not made out a case of negligence.

Moreover, granting for the sake of argument *only* that there was a burden on the defendants, it was not the *burden of proof,* strictly speaking; it was simply the burden of going forward with evidence. Mr. Wigmore calls attention to the fact that those two expressions are not to be confused (*Wigmore on Evidence,* p.....; see also 22 *C. J.,* p. 67).

Evidence tending to show that the flood was an ordinary one having been produced by the plaintiffs, surely (under a general denial of negligence) defendants need produce evidence *only tending* to meet the case made by plaintiffs, and then it is for the jury to say whether defendants' evidence is strong enough to *balance* plaintiffs' evidence.

In conclusion on this branch of the case:

If all the evidence produced by defendants does not even tend to show an extraordinary flood, what requisite is lacking?

It is said that the *locus in quo* was a rainy country, and that defendants should have expected floods. So it is, and so they should, but all things are relative, and a flood even in a rainy country may come at an unexpected time and with unexpected violence.

Were defendants required to produce evidence of a cloudburst or a tidal wave or earthquake, or of some similar overwhelming *vis major?* Certainly *such vis major* is not the *only* thing the prudent man is not required to guard against; else is Mr. Weil wrong when he says,

> "It is thus not true to say that only 'Acts of God' absolve from liability for flood, since reasonable care cannot guard against some floods which still fall short of technical *vis major*" (1 Weil on Water Rights, sec. 462, p. 493, bottom, 3d Ed.).

Were defendants required to prove that the flood was *unexplainable?*. All floods are *unexplainable,* even a moderate flood. Indeed, although man *essays* to explain most of the phenomena of nature, yet in his explaining he can only go a step or two, whether the object to be explained is the earthquake or the summer shower. But still the earthquake may be and generally is unexpected and unexpectable, while the summer shower may be and generally is expected and expectable.—And the question of negligence or no negligence depends not on whether a thing can or cannot be explained after it has happened, but rather on whether it was or was not reasonably to be expected. In defining extraordinary flood the author of the Am. & Eng. Encyc. does not use the word "unexplainable". He says: "An extraordinary flood is one of those *unexpected* visitations" etc. (13 Am. & Eng. Encyc. Law, 2nd Ed., p. 687).

Has the evidence gone back *not far enough* in point of time? It has gone back to a period before the coming of the white man in 1881. Defendants say they were familiar with climatic conditions so far as they could be learned, and built the cribbed channel much larger than other flumes carrying the creek. There is no specified number of years which the prudent man, everywhere and under all conditions, must embrace in his investigations, in order not to be classed as imprudent. It all depends on "reasonableness" and "reasonableness" depends on circumstances, and the jury is

the judge of "reasonableness under the circumstances".

The character of the storm as being ordinary or extraordinary is for the jury.[2]

II.

LAW OF THE CASE—EIKLAND v. CASEY, 266 Fed. 821.

Plaintiffs maintain that the decision of this court on the former writ of error in the case is the "law of the case", and is conclusive to the effect that the court should have given the requested instruction as above set out; but certainly the decision of this court on the former writ of error is not the "law of the case", except in so far as the point then before the court and actually decided by it is presented on this writ of error; and, too, said decision is not the "law of the case", except in so far as the issues, evidence and instructions here presented are substantially the same as the issues, evidence and instructions there presented.

It is pertinent, then, to inquire: (A) What was the point presented and what was actually decided at the hearing on the former writ of error? (B)

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(2) *Garrett v. Beers*, 97 Kans. 255;
Gult R. Co. v. Calhoun, 24 S. W. 362;
Ohio v. Thillman, 143 Ill. 127;
Topsham v. Lisbon, 65 Me. 449;
Mandy v. N. Y. R. Co., 75 Hem. 479;
McClure v. Red Wing, 28 Minn. 195;
Borchardt v. Wassau, 54 Wis. 107;
H. G. N. R. v. Parker, 50 Tex. 330;
Gray v. Harris, 107 Mass. 492.

How, if at all, do the issues, evidence and instructions presented on this writ of error differ from those which obtained on the former writ of error?

A.

WHAT WAS DECIDED ON THE FORMER WRIT OF ERROR?

This question was there presented, to-wit: Were the instructions of the court upon the question of an ordinary flood sufficient? This court said: "We think the exception was well taken", and it sent the case back for a new trial (266 Fed. 823).

The question as to whether or not the evidence there was sufficient to show extraordinary flood was not before the court. Indeed plaintiffs themselves considered that the evidence on the point was sufficient, for they made no motion for the court to instruct that said evidence was insufficient, and they themselves requested instructions on the subject of "act of God" (see Requested Instructions, bottom of page 245, Tr. in No. 3365, Eikland v. Casey, 266 Fed. 821). They complained not that the evidence was insufficient, but that the instructions given were not sufficient.

We maintain that nothing is the "law of the case" except that the instructions given on the former trial were insufficient, and we further maintain that the issues *now* are substantially different and the evidence substantially stronger and the instructions substantially different.

B.

ISSUES DIFFERENT; EVIDENCE STRONGER; INSTRUCTIONS DIFFERENT.

Issues Different. The only delict charged in the complaint, as it was on the former trial, was "That the new channel thus constructed" etc. (P. 3 old record.)

As beforesaid, the action was not then founded on negligence at all, but solely on the claim that the law is that one who deflects the flow or lessens the capacity of the channel is liable whether he was or was not guilty of negligence in the construction.

The opinion on the former occasion is based upon the assumption that the things so charged were *established as facts,* for in the statement immediately preceding the opinion proper it is said:

> "The evidence *showed that the defendants constructed* bulkheads across Gold Creek and thus dammed the same and diverted it from its natural bed";

and in the opinion proper it is said,

> "The defendants, for their own benefit, closed the channel and made a new one, against the plaintiffs' protest that the change would endanger their property."

It would not be pertinent to inquire here whether the things so stated as facts were or were not disputed at the former trial. It is sufficient that this court stated them to be facts, and based its opinion on said statement of facts. But, however that may

be, that which the court stated as being *facts then* before it is not before it *now* as "facts", for each and all of the material allegations of the Amended Complaint are put in issue by the Answer, and the evidence disputes them all.

And by injecting into the case a pure question of negligence in the construction of the cribbing, and by introducing evidence of the alleged faulty construction, and of the character of the flood which strained and broke the cribbing, the plaintiffs have made a case which defendants surely may meet (under the general denial) by introducing evidence tending to show that the strain which smashed the cribbing was one which an ordinarily prudent man is not required to guard against, and so there would be presented a question for the jury and not for the court.

The statement of this court on the former Writ of Error to the effect that the evidence there produced was insufficient to show "act of God" goes this far, then, and no further, to-wit: "When no charge is made of faulty construction of the cribbing, and *when it is a fact* that defendants changed the flow and lessened the capacity of the channel, the burden is on defendants to show 'act of God' by 'clear and convincing' evidence".

But the evidence as to the character of the flood is *now* much stronger than it was at the other trial, viz:

Evidence stronger.

The opinion of this court on the former trial intimates that the evidence there produced was not sufficient to show act of God, and it goes on to particularize as follows (Tr. p. 266, fol. 823):

> "Defendant Casey admitted that before the cribbing was put in he knew that at times of very high water the water would flow over the banks at any place."

There is no such admission in the evidence *here.*

> "The defendants called three witnesses who testified as to their observation of floods in the stream during the last 10, 11 and 15 years, and their testimony covering as it does so short a period of time, may be held negligible."

The testimony *here* presented goes back for 23, 25, 27 and even 50 years or thereabouts.

> "The defendants also called witnesses who had observed the stream for longer periods. Coggins who had lived in Juneau 23 years when asked whether he had ever seen freshets as high as that of 1918, answered, 'They might have been higher for all I know' ".

Coggins was *called by plaintiffs, not by defendants.*

> "Layton was asked whether within his memory of 30 years he had seen as great a rainfall or as high water as on September 26, 1918—he answered, 'No, I don't think so' ".

Layton's testimony *on this trial* is clear and positive.

> "Behrend who had been thirty-two years at Juneau said that he thought the flood was the

greatest he had ever seen, but he would not undertake to say positively that it was."

Behrend's testimony *on this trial* is much stronger.

On this trial defendants produced not only every witness heretofore produced, but also Susie Michaelson, John Reck, George Dull, Charles Goldstein—all of them old residents of Juneau, whose acquaintance with the creek and climatic conditions goes back for many years; and while one or two of them (Goldstein) is not certain as to "rainfall", all of them are positive as to the extraordinary height of the water in Gold Creek and its destructiveness. The testimony of the Indian woman, Susie Michaelson, alone vastly strengthens the case. The "untutored savage" makes close observation of the manifestations of nature, noting minute details of wind and tide and flood and snow; and, too, his memory revivifies the experiences of his own life, and preserves the traditions handed down from father to son of all the remarkable happenings which have affected his habitat or his race. This woman, 50 years of age, was born where Juneau now is, and was ten years old when the white man came to Juneau in 1881 (Tr. p. 362). For years she lived on the banks of the creek, and practically all her life has been spent in the vicinity. There is no evidence even of a tradition of a flood so great. No Indian is produced who ever saw or heard of such a flood or such a rainfall. Plaintiffs produced no one who swears he ever saw so great a rainfall, and they could produce only one man who was willing to swear that there was ever so much water in the creek. He,

Wagner by name, swears that once (time not stated) the creek was a foot and a half higher than it was in 1918. This is remarkable testimony, for the flood of 1918 took out a bridge which was 4 or 5 feet higher than a certain other bridge which had been spanning Gold Creek Canyon since before Wagner came to the country. He says that the flood he speaks of was 1½ feet higher than that of 1918, and yet it did not take out a bridge which was 4 or 5 feet lower than the bridge which went out in 1918. The keen "scent for testimony" which discovered Wagner "went cold on the trial", for not another Wagner was produced. It is fair to assume that "his like was not to be found on land or sea".

Instructions different.

The instruction given at this trial as to what is an extraordinary flood is not the same as the former instruction on that subject (Instruction in this case, Tr. p. 388, top par.; Instruction in that case, Tr. in No. 3365, p. 353 bottom).

In its opinion this court inadvertently misquoted the Am. & Eng. Encyc. Law, using the words "*unexplainable* visitation" (266 Fed. 823), while the text used the words "*unexpected* visitation". But the instruction given at this trial went even further than "unexplainable visitation"—the instruction says "unexplained visitation" (Tr. p. 388).

No claim is made now that "the instructions on the subject of 'extraordinary flood' are not sufficient under the evidence".

We submit, then, that the decision on the former Writ of Error having been rendered when the issues were different, and the evidence was less and the instruction was different, is not the "law of the case" to the extent of sustaining this Assignment. And we further submit that there is obsolutely no foundation for saying (as plaintiffs do say) that the lower flouted the decision of this court.

ASSIGNMENT No. I. (Tr. p. 395.)

"That the court erred in refusing to direct a verdict for plaintiffs".

The requested instruction could be justified only if three conditions obtain, viz: (1) If the law is that "If defendants interfered with the flow, or lessened the capacity of the channel, they are liable, whether there was or was not negligence"; (2) If the *undisputed* evidence is that defendants did interfere with the flow, or lessen the capacity of the channel, and (3) If the evidence as to the faulty construction of the cribbing and of the character of the flood was such that the court would have been justified in instructing the jury that *as a matter of law* defendants were negligent in that regard.

Not one of these conditions obtains here. The *non-existence of condition No. 1* is established by the overwhelming weight of American decisions,

including the decisions of this court—said authorities holding that defendants would not be liable unless they were guilty of negligence; and the *non-existence of condition No. 2* is established by the fact that the charges of interfering with the flow, and of lessening the channel's capacity are, each and both, *denied in the Answer and disputed* in the evidence for defendant; and the *non-existence of condition No. 3* conclusively appeared, we think, in the foregoing discussion of Assignment of Error No. 2.

IN CONCLUSION.

The gist of the action is negligence. The evidence tending to show that the defendants were not negligent is abundant; the jury, "native here and to the manor born", has decided that the defendants were not negligent; no error in instructions has been established; none other is claimed by plaintiffs in error.

The judgment should be affirmed.

Dated, San Francisco,
May 19, 1923.

Respectfully submitted,
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